

*Squire, Sanders & Dempsey*

*Additional Offices:*  
*Brussels, Belgium*  
*Cleveland, Ohio*  
*Jacksonville, Florida*  
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*Phoenix, Arizona*  
*Washington, D.C.*

*Counsellors at Law*  
*Huntington Center*  
*41 South High Street*  
*Columbus, Ohio 43215*

*Telephone: (614) 365-2700*  
*Telecopier: (614) 365-2499*

*Direct Dial Number*

September 21, 1990

(614) 365-2725

**BY REGISTERED MAIL**

Debbie Fript  
 U.S. EPA - Region V  
 Emergency Support Section 5HS-12  
 230 South Dearborn Street  
 Chicago, Illinois 60604

Re: Himco

Dear Ms. Fript:

This letter is in response to your letter to Foamex Products, Inc., dated September 4, 1990, but received September 13, 1990.<sup>1</sup> The Agency has advised that, because of elevated concentrations of sodium in groundwater, homes located on County Road 10 in Elkhart that currently use private water wells will be connected to the municipal water supply. The letter offers Foamex (along with approximately 40 others) an opportunity to perform the action in lieu of the Agency. The letter also states: a) that this action is being taken pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et. seq., as amended; b) that the Agency has documented a release from the Himco Landfill; c) that the Agency will spend public funds to control and investigate the release; d) that responsible parties are liable for all costs associated with response action; and e) that Foamex is among those who may be potentially responsible parties because it may

1. In its letter, the Agency requests a response within seven days. However, due to the absence of the designated contact from U.S. EPA offices until Monday, September 17, 1990, the Office of Regional Counsel suggested on Friday, September 14, 1990 that an extension of time in which to respond would be allowable if necessary. Accordingly, although the appropriate response date would be September 24, 1990, this letter is submitted today.

*Centennial Year: Founded January 1, 1890 by Andrew Squire, William B. Sanders and James H. Dempsey*

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have generated hazardous wastes that were transported to the site.

After careful evaluation of the wastes generated at Foamex, the action described in Agency's letter, and the release that the Agency seeks to address by this action, Foamex advises that it is not a potentially responsible party with respect to this release and the elevated concentrations of sodium at or near the Himco Landfill. First and foremost, there is no indication that Foamex generated any waste that may have resulted in contamination at the Himco site. In addition, there are financially viable owners and operators of the site and generators of sodium wastes which should be the only parties to receive notice letters from U.S. EPA.

As a preliminary matter, it is important to note that the Agency's proposed action represents a change in position that is based solely on the discovery of sodium contamination in drinking water wells. As recently as July, the Agency was reported in local newspapers to have informed nearby residents that, because of the lack of any demonstrated contamination, there was no legal basis for converting private wells to the municipal water supply. At the time, the available groundwater information, a 1979-1981 study by the United States Geological Survey, indicated "the highest levels of the contaminant found - bromide - had not been found to be direct danger to human health." Within the space of less than two months, however, the Agency has changed its position and determined that nearby residents should be connected to the public water supply. The basis for this change appears to be that on August 8, 1990, the Agency for Toxic Substances and Disease Registry reported that residential wells downgradient of the Himco Landfill contained elevated concentrations of sodium. Significantly, the ATSDR also reported that no other contaminants were found in elevated concentrations.

With this in mind, there is no basis for sending a general notice letter to Foamex. As Foamex has previously indicated in its responses to the Agency's information requests, no hazardous wastes were disposed at the Himco Landfill, and the solid wastes which may have been disposed at the landfill included non-hazardous scrap. There is no indication that Foamex even generated any sodium wastes, much less that any such wastes would have been disposed at Himco. Accordingly, there is no

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basis for the Agency's statements that Foamex may be a potentially responsible party for any release of sodium at the Himco Site.

However, as has been publicly reported, as much as 360 tons per day of medical and pharmaceutical waste, including sodium and potassium bromide, was disposed at the Landfill by other companies. One newspaper article estimated that two-thirds of the waste hauled to the landfill was from a single company whose wastes contained both sodium and potassium bromide. In addition, Himco Waste-Away both operated the site and was the major or sole transporter of wastes to the site. In fact, the site has previously been the subject of investigation by the State of Indiana, and documents in U.S. EPA's files indicate that Himco has previously provided some neighboring residents with alternative water supplies. Similarly, there are reportedly several owners of the site, including possibly Himco. Based on these circumstances, it is clear that the Agency should focus its response efforts on owners and operators, who should have primary responsibility for ensuring proper operation and maintenance of the site, and on generators of sodium waste. Simply as a practical matter, the people who operated the site, owned the site, sent two-thirds of the waste, and sent the waste that appears to be creating problems with water wells should be the parties whom the Agency engages in negotiations for a reasonable response to demonstrated problems.

Just as important, the Agency may be prevented as a matter of law from presenting claims against small-volume generators when the Agency has failed to properly address the liability of financially solvent owners and operators, and generators that may have sent more than two-thirds of all waste to the site. At least one District Court within the Seventh Circuit of the United States Court of Appeals (where the Himco site is located) has adopted a so-called "moderate" approach to liability under the Superfund Act which would preclude the imposition of liability in such egregious circumstances. See U.S. v. A & F Materials, 578 F.Supp 1249 (S.D. Ill. 1984). Although recognizing that a court has the power to impose joint and several liability for indivisible injury on those classes of responsible persons explicitly set forth in the Superfund Act, the A & F court adopted a rule of law under which courts may apportion responsibility according to such factors as the degree of the parties' involvement in the management of the waste and

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the amount of the waste involved, among others. The court explicitly recognized the court's power under CERCLA to rationally examine the parties' relationship at a site in determining potential liability.

[T]he moderate approach promotes fairness because it does not indiscriminately impose joint and several liability. Rather, it makes rational distinction based on such factors as the amount and toxicity of a particular defendant's contribution to a waste site.

U.S. v. A & F Materials, 578 F.Supp 1249, 1257 (S.D. Ill. 1984).

In adopting this moderate approach, the court recognized that congressional intent behind CERCLA did not warrant the imposition of joint and several liability on "minor contributors."

[B]oth Houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site.

Id. at 1256.

Accordingly, it is incorrect for the Agency to flatly assert that any potentially responsible party is liable for all costs incurred by the United States. The imposition of joint and several liability would be precluded by the fact that a) the operators and owners should have primary responsibility for maintaining the site, and b) there are generators who are solely responsible for the great majority of all waste sent to the site.

Finally, the Agency has indicated that some potentially responsible parties, including possibly owners of the site or major generators, may already be engaged in discussions with the City of Elkhart to address connection to the municipal water supply. At a minimum, the Agency should inform the recipients of general notice letters of the status of such efforts, since it would be unreasonable to expect approximately 40 potentially responsible parties to take independent or inconsistent action to respond to a

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narrowly defined task such as connecting neighboring residents to the water supply.

In sum, Foamex emphasizes that it has no connection to any release of sodium at the Himco site. In addition, even if there were any demonstrable connection to such a release, it would nonetheless be necessary both as a practical matter and as a matter of law to address necessary response actions resulting from such a release with identified, financially solvent owners and operators of the facility, and generators that have been alleged to have sent hundreds of tons or more of sodium wastes to the site.

I appreciate your attention to the matters raised in this letter. With respect to future communications, please contact me at the above address and telephone number.

Very truly yours,



Michael J. Maurer

MJM:ckc  
Enclosure

cc: James Koewler, Jr.  
Geoff Barnes

*Squire, Sanders & Dempsey*

*1300 Huntington Center*

*41 South High Street*

*Columbus, Ohio 43215*

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Debbie Fript

U.S. EPA - Region V

Emergency Support Section 5HS-12

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Chicago, Illinois 60604

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